SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 558

MAYO S. LEVENSON,
PETITIONER

v.

PETER MILLS, UNITED STATES ATTORNEY,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

HAROLD ROSENWALD
PAUL A. POWELL
85 Devonshire Street
Boston, Massachusetts
Attorneys for Petitioner

Of Counsel:
ALAN J. LEVENSON
187 Middle Street
Portland, Maine

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Mayo S. Levenson, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the First Circuit affirming an order of the United States District Court for the District of Maine which disbarred petitioner from practice in said District Court and directed that petitioner's name be stricken from the roll of attorneys permitted to practice before that Court. (R 324)

Opinions Below

The "Findings, Opinion and Order" of the District Court (Gignoux, J.) are not reported but are found at

pages 299 *et seq.* of the Record Appendix. The opinion of the Court of Appeals is reported at 294 F.2d 397, and is reprinted as Appendix A of this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on August 24, 1961. (R 333) The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

Questions Presented

1. Whether an order of a United States District Court for disbarment of an attorney for alleged conduct unbecoming a member of the bar is valid where it is not based on clear, unequivocal and convincing evidence which does not leave the issue in doubt.[1]

2. Whether, in circumstances such as existed in this case, an order of disbarment is unduly severe.

Statement of the Case

Introductory

The salient facts in this case may be briefly stated:

(i) Petitioner is a lawyer, 57 years of age, and has been actively engaged in the practice of law in Portland, Maine, for more than thirty years.

(ii) Petitioner represented alleged secured credi-

[1] This issue was raised in the Court of Appeals. The statement of points included a contention that "the Findings are against the weight of the evidence." (R 326) Moreover, petitioner's brief in that Court specifically argued that the charges must be supported by clear and convincing proof.

tors in a bankruptcy proceeding before the Referee of the District Court.

(iii) In the course of these proceedings petitioner had two conversations with the Referee, one in person and one on the telephone, and two conversations with the Trustee, both on the telephone.

(iv) As a result of these conversations, and on the complaint of the Referee, disbarment proceedings were instituted against petitioner in the District Court.

(v) There had been no complaint or prosecution by any bar association, no prior disbarment by the state courts of Maine, and no prior conviction of any crime.

(vi) At the trial the critical issues related to the contents of the conversations on which the case against petitioner was based. There was a sharp conflict in the testimony, which was resolved against petitioner.

(vii) Had petitioner's versions of the conversations been accepted, disbarment would not have been justified.

(viii) Petitioner has been deprived of status, privileges and honor on evidence that was not clear, unequivocal and convincing, and which left the issue in doubt.

On December 27, 1960, Richard E. Poulos, Referee in Bankruptcy for the District Court, filed a Certificate in that Court pursuant to United States Code, Title 11, Sec. 69(a) and (b). (R 306) The Certificate alleged that on September 7, 1960, an involuntary petition in bankruptcy had been filed against Twin Town Chevrolet Co., Inc.; that on September 17, 1960, Twin Town had been adjudicated a bankrupt; and that at the first meeting of creditors

on October 3, 1960, Myer M. Marcus had been appointed as Trustee in Bankruptcy, and thereafter John J. Flaherty had been appointed as attorney for said Trustee. (R 5-6)

It was further alleged that within a few days after October 3, 1960, petitioner came to the Referee's office and informed the Referee that his clients, William H. Clifford and Ernest M. Shapiro, held a chattel mortgage on some assets of the bankrupt and were entitled to a priority payment of ten thousand dollars; that, after reminding the Referee that Mr. Clifford's brother, the late District Judge John D. Clifford, Jr., had appointed the Referee to his present position and stressing that he was not receiving any compensation in money for his services, petitioner inquired as to what "disposition" would be made of the matter; and that the Referee outlined the procedure that would be followed and stated that the case would be treated no differently from any other proceeding before the bankruptcy court. (R 7) In view of this conversation, according to the Certificate, the Referee immediately telephoned Mr. Flaherty, attorney for the Trustee, and cautioned him to be "particularly careful" about the matter with which petitioner was concerned so that the interests of all creditors would be fully protected. (R 7-8)

The Referee further alleged that on December 5, 1960, Herbert H. Bennett, an associate of petitioner, filed a petition to determine the validity of said chattel mortgage; that a hearing was held on said petition on December 19, 1960; and that a bench conference was held prior to the hearing at which Mr. Flaherty raised serious objections to the mortgage. (R 8-9) It was further alleged that at about 11:30 A. M. on December 20, 1960, Mr. Marcus requested a conference with the Referee in order to refute certain statements made by Mr. Bennett at the hearing of December 19, 1960, concerning a purported agreement be-

tween Mr. Marcus and Mr. Bennett as to the validity of the mortgage; that such a conference was held at that time at the Referee's office, and was attended by the Referee, Mr. Marcus and Mr. Bennett; that at that conference the Referee criticized the method in which the matter had been presented by counsel for Messrs. Clifford and Shapiro "especially in view of Mr. Levenson's highly improper implication at the very outset of this proceeding that special consideration should be given to his clients"; and that the Referee suggested that counsel for each side confer to determine points of agreement or disagreement so that the matter could be presented to the Referee in a proper manner. (R 9)

The Certificate further alleged that at about 3:00 P. M. on the same day, December 20, 1960, the Referee received a telephone call in his office from petitioner; that from the tone of his voice petitioner was exceedingly angry; that petitioner stated that he had conferred with Mr. Bennett and was disturbed to learn that the Referee's suspicions had been aroused by petitioner's visit to his office and that the Referee had advised Mr. Flaherty to be careful in the matter; and that, upon receiving the Referee's confirmation of these facts, petitioner became highly abusive and used intimidating, scandalous and indecent language in an obvious attempt to influence and obstruct the administration of justice. (R 9-10) In this conversation, according to the Certificate, petitioner stated that he had always considered himself a friend of the Referee and had protected the Referee against influential persons because of his decisions and policies regarding secured creditors by "touting" him as "the finest referee in bankruptcy Maine has ever had"; that henceforth petitioner would regard the Referee as an enemy; that it was "none of your damned business to question the validity of mortgages"; and that petitioner would conduct a "vicious

campaign against you by organizing the leading law firms in Portland, the Portland banks and other influential persons to exert pressure on Judge Gignoux, so that you would not be reappointed as referee in bankruptcy"; and that petitioner would cause as much trouble as he could to damage the Referee's professional and personal reputation. (R 10) In addition, it was alleged, petitioner complained that his clients were being forced to prove their case on a technical basis, even though Mr. Clifford was a brother of the District Judge who had appointed the Referee, mentioned again that he was not receiving compensation in the form of money, and warned that the Referee "would have to pay dearly" for the manner in which petitioner's clients were being treated (R 10-11)

It was further alleged that at about 5:45 P. M., December 21, 1960, Mr. Marcus telephoned the Referee at his office and stated that petitioner had telephoned Mr. Marcus early in the morning of December 20, 1960, and again on December 21, 1960; and that Mr. Marcus quoted petitioner as being displeased at the way that the hearing on the chattel mortgage was progressing, and stated that petitioner had used threatening, scandalous and indecent language and had made malicious remarks about the Referee's character, and that petitioner had said that he would endeavor to harm the Referee's reputation so that he would not be reappointed. (R 11-12)

Finally, the Referee alleged that petitioner's tactics and actions had so disturbed the Referee that his freedom of decision had been impaired and that he had found it necessary to disqualify himself from determining the validity of the chattel mortgage. (R 12-13)

The Referee stated that he had issued an order to show cause why petitioner should not be held in criminal contempt, and, if the District Court had no power to adjudicate contempt in a summary proceeding, then the Certifi-

cate should serve as a motion for the disbarment of petitioner from practice in the District Court. (R 13)

On December 29, 1960 the District Court entered an order directing the United States Attorney to file a motion for the disbarment of petitioner and appointing him as counsel to prosecute said motion. (R 2) The United States Attorney filed such a motion, with the Referee's Certificate attached, on December 30, 1960. (R 2, 4-5) On January 3, 1961, the District Court ordered petitioner to appear before that Court on January 4, 1961, to show cause why he should not be disbarred. (R 2, 14-15)

Petitioner filed a plea to the charges in the Certificate of the Referee. (R 2, 15 *et seq.*) In substance, the plea admitted the background allegations of the Certificate; admitted that petitioner went to the Referee's office in October, 1960, and discussed the chattel mortgage with the Referee; denied that petitioner reminded the Referee that he had been appointed by the late Judge Clifford, the brother of petitioner's client; and denied that petitioner made any improper suggestions concerning the handling of the chattel mortgage. (R 15-16) The plea also admitted that petitioner called the Referee on December 20, 1960; admitted that petitioner was angry, and assigned as a reason for his anger the action of the Referee in publicly impugning petitioner's personal and professional character without cause; and denied that he told the Referee that he had no "business to question the validity of mortgages", or that he had urged the relationship of his client and Judge Clifford as having any bearing on the decision concerning the chattel mortgage (R 16-17) Moreover, the plea denied any knowledge of the substance of the telephone conversation between the Referee and Mr. Marcus on December 21, 1960; and averred that any remarks petitioner may have made to Mr. Marcus were irrelevant to this proceeding. (R 17) Finally, the plea alleged that peti-

tioner did not intend improperly to influence the Referee or to obstruct justice. (R 17)

The contempt and disbarment matters[2] were tried before District Judge Gignoux on the issues raised by the Referee's Certificate and petitioner's plea, the trial extending from January 4, 1961, to January 7, 1961. Reference will be made to the evidence in the following discussion. For the present it is sufficient to say that the evidence was entirely oral on all substantial issues and was in sharp conflict as to what was said in the two conversations between petitioner and the Referee and the two conversations between petitioner and Mr. Marcus.

At the conclusion of the trial, Judge Gignoux announced his "findings, opinion and order." (R 2, 299 *et seq.*) Recognizing the conflict in the evidence, he stated: "The Court is faced primarily with stark issues of credibility as between the Respondent and the Referee" (300) However, he resolved each conflict against petitioner by accepting uncorroborated testimony against the unequivocal contradictions of petitioner even when corroborated by other testimony.

The Court of Appeals acknowledged that the "evidence is sharply conflicting on the key issues," and that those issues could only be decided "on the basis of the relative credibility of the witnesses." App. A 32) Referring to Rule 52(a) of the Federal Rules of Civil Procedure, that Court stated that the trial court is peculiarly competent

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[2] Petitioner moved to vacate the Referee's order to show cause why petitioner should not be held in contempt of court upon the ground that the case did not fall within the summary contempt power of the Court. *Nye* v. *United States*, 313 U.S. 33 (1941). The Court, with the agreement of counsel for both parties, determined to try the disbarment and contempt proceedings together, and, if adequate punishment should be indicated in the disbarment proceeding, to dismiss the contempt proceeding as, in effect, moot. (R 18-19) Subsequently, the order to show cause why petitioner should not be held in contempt was vacated. (R 324-325)

to judge credibility and that its findings "cannot by any means be said to be 'clearly erroneous.'" (App. A 33) The Court of Appeals did not discuss the quantum of proof requisite in the case.

Reasons For Granting The Writ

Importance of the Issues

This case raises an issue of crucial importance to the position of lawyers in the Federal courts which has not been, but should be, settled by this Court. That issue relates to the evidentiary rules that should govern in proceedings for the disbarment of lawyers for alleged misconduct in their professional activities. Specifically, the issue is whether such disbarment should be decreed where the misconduct is not established by clear, unequivocal and convincing proof.

Disbarment of an attorney deprives him of his profession, his means of livelihood and his honor and reputation. Such action should not be taken on the basis of sharply conflicting evidence which cannot be resolved without leaving the issue in doubt. Especially is this true where the alleged misconduct occurs in an altercation between a judicial officer and a lawyer, engaged in the protection of his client's interests. The independence of the bar would be in jeopardy if in such a case the uncorroborated testimony of the judicial officer could prevail against the sworn unequivocal denial of the lawyer.

The issue of the severity of the sentence is also important. Accepting the findings of the District Court, *arguendo*, we submit that this Court should determine whether a District Court should permanently disbar a lawyer for overzealous conduct on his client's behalf with no motive of personal gain and in the light of other circumstances such as existed in this case.

The Issues Presented

I. *Whether An Order For Disbarment For Professional Misconduct Must Be Predicated On Clear, Unequivocal and Convincing Evidence*

We are not here concerned with cases where Federal disbarment proceedings are predicated upon prior disbarment by a State court, such as *Theard* v. *United States*, 354 U.S. 278 (1957), or conviction of a crime, such as *Sacher* v. *Association of the Bar of the City of New York*, 347 U.S. 388 (1954). In the present case there had been no prior adjudication of the acts relied upon for disbarment, and the District Court tried the issues for the first time. Thus, the safeguards that surround the formal procedures of investigation and prosecution by a bar association or trial by jury were absent. *Cf. In re Sawyer*, 360 U.S. 622, 624, n. 2 (1959); *Phipps* v. *Wilson*, 186 F.(2d) 748 (C.A. 7, 1951); *In re Patterson*, 176 F.(2d) 966 (C.A. 9, 1949).

Disbarment from the Maine bar by the courts of Maine can be adjudged only "where the evidence is of a conclusive character." *Penobscot Bar* v. *Kimball*, 64 Me. 140, 147 (1875). See *Wintle* v. *Wright, Adm'r.*, 151 Me. 212 (1955). It would be anomalous if a lesser degree of proof were required in a proceeding in the United States District Court to disbar from membership in its bar.

The District Court found that petitioner is a member of the Maine bar[3] and that he was admitted to practice in the District Court on December 21, 1927. (R 300) Under the Maine statute then in effect petitioner was required to be "of a good moral character" in order to be admitted to the Maine bar. Ch. 84, sec. 25, Rev. Stats. of Maine (1916);

[3] Petitioner was admitted to the Maine bar on October 12, 1926.

The court order admitting petitioner to the Maine bar constituted a "judgment of the court that he possesses the requisite legal qualifications and good moral character" to practice law. *Penobscot Bar* v. *Kimball*, *supra*, 64 Me. at page 145-146. Under the rules of the District Court in effect at the time it was required that "petitioner's private character and professional reputation be good", and that he had been an attorney and counsellor in the Supreme Judicial Court of Maine for at least one year in order to be admitted to the bar of the District Court. Rule 1, Rules of the United States District Court for the District of Maine. (May 1, 1916.)

Thus, the order of disbarment in this case deprived petitioner of his status as a member of the bar of the District Court, which was founded on a judgment of a Maine court that he was of good moral character and an adjudication of the District Court that his private character and professional reputation were good. It is important for this Court to determine the standard of proof that is required to support such an order of disbarment.

We have found few opinions of the Federal courts which have discussed the requisite quantum of proof in disbarment proceedings. Where disbarment was sought for criminal conduct not related to professional activities, and there had been no conviction of the alleged crime, this Court has stated that if "the evidence is conflicting, and any doubt of the party's guilt exists, no court would assume to proceed summarily, but would leave the case to be determined by a jury.[4]" *Ex Parte Wall*, 107 U.S. 265, 288 (1883).

The Court of Appeals for the Seventh Circuit, influenced

[4] In a frequently quoted dissent, Mr. Justice Field stated that disbarment should not be permitted except where one is shown by "the clearest legal proof to be unfit to be a member of an honorable profession." 107 U.S. at page 318.

by decisions of the Illinois Supreme Court, has reversed an order of suspension for professional misconduct on the ground that it was "not supported by that clear and convincing testimony which courts generally require in a matter of the instant character." *In re Fisher*, 79 F. (2d) 361, 370 (C.A.7, 1950). In the present case, the Court of Appeals held that the findings of the trial court would stand unless "clearly erroneous." (R 331)

In the Federal courts the quantum of proof problem has been confused by the doctrine, stemming from *Ex parte Burr*, 22 U.S. (9 Wheat.) 529 (1824), that a disbarment or suspension order rests in the discretion of the trial court and may be set aside on appeal only for abuse of discretion. The Court of Appeals for the Second Circuit has followed that doctrine. *In re Chopak*, 160 F. (2d) 886 (C.A.2, 1947); *In re Schachne*, 87 F.(2d) 887 (C.A.2, 1937). However, one judge of that Court has expressed doubt as to the scope of review in an appeal from a suspension order. *In re Chopak, supra*, 160 F.(2d) at page 889 (Clark, C. J., dissenting). In the present case the Court of Appeals was undoubtedly influenced by its earlier decision that, in proceedings for the disbarment or discipline of attorneys, a reviewing court would upset an order of the trial court "only on a showing of abuse of discretion or great irregularity." *In re Claiborne*, 119 F. (2d) 647, 651 (C.A. 1, 1941). See, also, *In re Patterson, supra*.

But this Court, *sub silentio*, has abandoned the doctrine of *Ex parte Burr, supra*. *Sacher* v. *Association of the Bar of the City of New York, supra*, (see dissenting opinion of Mr. Justice Reed, 347 U.S. at page 389). And in *In re Sawyer, supra*, this Court, despite the concurrent findings of two lower courts, carefully examined the evidence in support of a disbarment order "to see whether it furnishes a rational basis for the characterization put on it by the lower courts." 360 U.S. at page 628.

The question of the evidentiary rules to be employed in disbarment cases is further confused by a difference of opinion in the Federal courts as to whether the Federal Rules of Civil Procedure apply. In the present case the Court of Appeals relied upon Rules 52(a) and 61. (App. A. 33, 34) But the Court of Appeals for the Ninth Circuit has held that the Civil Rules have no application since "disbarment is not an adversary proceeding." *Coughlan* v. *United States*, 236 F.(2d) 927, 928 (C.A.9, 1956). And this Court has held that, while a disbarment proceeding is not criminal, the consequences "take it out of the ordinary run of civil cases." *Konigsberg* v. *State Bar*, 353 U.S. 252, 257 (1957). *Cf. Schneiderman* v. *United States*, 320 U.S. 118, 160 (1943).

A majority of the state court decisions require "clear and convincing" proof, or its substantial equivalent, to sustain a determination that an attorney be disbarred or suspended. See *Penobscot Bar* v. *Kimball, supra; In re Everett*, 80 Ariz. 124 (1956); *Golden* v. *The State Bar*, 213 Cal. 237 (1931); *State* v. *Bass*, 106 So. (2d) 77 (Fla., 1958); *In re Fisher*, 15 Ill. (2d) 139 (1958); *Pet. for Disbar. of L. Percy Quinn, Sr.*, 223 Miss. 660 (1955); *State* v. *Fisher*, 170 Neb. 483 (1960); *In re Martin*, 67 N.M. 276 (1960); *In re Little*, 40 Wash. (2d) 421 (1952). In some jurisdictions a preponderance of the evidence is sufficient. *Matter of Baby*, 328 Mass. 542 (1952); *Matter of Mayberry*, 295 Mass. 155 (1936); *In re Filipiak*, 232 Ind. 414 (1953). See Annot., 105 A.L.R. 984 (1936).

The British Privy Council has stated that "in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for" and "a mere balance of probabilities" is not sufficient. *Bhandari* v. *Advocates Committee*, [1956] 3 All E.R. 742.

Disbarment proceedings have compelling analogies to

denaturalization proceedings. In both cases a status conferred by solemn judicial action is under attack; in both cases the status confers precious rights which should not be lightly revoked; in both cases the proceeding is not criminal but, because of the great issue at stake, is not an ordinary civil action. This Court has held that a denaturalization order cannot rest upon a mere preponderance of the evidence but must be supported by "'clear, unequivocal, and convincing' evidence which does not leave the issue in doubt." *Schneiderman* v. *United States*, *supra*, 320 U.S. at page 135; *Baumgartner* v. *United States*, 322 U.S. 665 (1944). It is respectfully submitted that this Court should determine whether any lesser degree of evidence can sustain an order depriving an attorney of his precious status as a member of the bar. *Cf.* 60 Harv. L. Rev. 111 (1946).

In view of the confused state of the law, this Court should define the evidentiary rules that should be applied in disbarment proceedings in the Federal courts. Greater protection for all members of the legal profession, including those who fail to conform to prevalent popular opinions, will be afforded if strict rules of proof are required in such cases. See *Lathrop* v. *Donohue*, 367 U.S. 820, 883 (1961), dissenting opinion of Mr. Justice Douglas.

II. *Neither of the Courts Below Applied the Standard of Clear, Unequivocal and Convincing Evidence*

The District Court prefaced its findings of fact with an acknowledgment that "there was a direct conflict in the evidence with respect to many of the critical incidents involved" and that the Court was "faced primarily with stark issues of credibility as between the Respondent and the Referee." (R 300) The Court resolved this conflict by full acceptance of the testimony of the Referee. (R 299

et seq.) Other conflicts in the testimony were similarly resolved against petitioner.

Except for exhibits relating to the bankruptcy proceedings in the background, concerning which there was no dispute, there was no documentary evidence in this case. Petitioner's misconduct allegedly occurred in one personal conversation and one telephone conversation with the Referee and two telephone conversations with the Trustee. Petitioner admitted that all these conversations occurred but gave versions of their contents which, if accepted, would clearly not justify his disbarment.

The Referee's testimony concerning the personal conversation between him and petitioner in October, 1960, adopted *verbatim* in the findings of the District Court, (R. 303-304) was in substance as follows. On October 10, 1960 petitioner came to the Referee's office, closed the door, looked at the Referee very intently and said that he represented Bill Clifford who had a $10,000.00 mortgage in the Twin Town bankruptcy matter, that Clifford "is one helluva guy" and petitioner was "not charging him a dime", that petitioner wanted to know "just exactly how you are going to protect his claim", and that the Referee was "sitting in that seat now" because Judge Clifford, the brother of petitioner's client, had appointed him. The Referee replied that the case would be handled no differently from any other proceeding and petitioner would get a fair, impartial and correct decision, and he then outlined the procedure that would be followed. (R 23-25)

Petitioner testified that he told the Referee that he "was interested in knowing the process that he [the Referee] would employ in the disposition of the mortgage", and that he knew nothing about the mortgage but didn't think that "Bill Clifford would have anything to do with anything that was reprehensible"; that the Referee then said, "You are trying to say to me that Bill Clifford is

the brother of the judge that appointed me, so what", and that the Referee also said that petitioner would have to prove the mortgage "in every detail". (R 172-174) Petitioner admitted that he told the Referee, in response to a remark about his fee, that he "wouldn't charge Bill Clifford anything on a personal matter." (R 174)

The Referee inferred from his version of this conversation that petitioner meant to suggest "special consideration for Bill Clifford" in a pending case; (R. 25) whereas petitioner's version of the conversation in substance denies any such purpose. (R 318)

Militating against acceptance of the Referee's testimony at its face value are the following circumstances. The Referee testified that petitioner asked the Referee how he would "protect" the Clifford claim, whereas the Referee's Certificate alleges, consistently with petitioner's testimony, that petitioner inquired as to what "disposition" would be made of the matter. (R 7) Nor is the Referee's explanation of this discrepancy (R 55-56) very convincing. Furthermore, the Referee testified that petitioner was in the Referee's office "a half an hour or more." (R 26) It is difficult to understand why the Referee would have continued a conversation with petitioner for that length of time if any improper suggestion had been made by petitioner.

Finally, there can be no doubt that the Referee was extremely hostile to petitioner. His Certificate initiated the proceedings against petitioner, and during the trial he was treated by the Court as an interested party. (R 218) He admitted that he was offended by petitioner's testimony because it impugned his professional integrity. (R 287) In addition, he entertained suspicions, sometimes fanciful, concerning petitioner. (R 58-59, 64-65, 68) and on the occasion of a visit to the home of Mr. Clifford's nephew, less than three weeks after his conversation of

October 10th with petitioner and while the case was pending, (R 61-62) made a "passing statement" to Mr. Clifford's nephew that "Bill Clifford was foolish to hire Mayo Levenson in this matter." (R 62) In these circumstances, despite the findings of the District Court, the testimony of the Referee is surely not clear and convincing. *In re Fisher, supra*, 179 F. (2d) at pages 367-368. See *In re Everett, supra*.

In the conversation of October 10, 1960, the Referee admitted, he was "amazed to learn that William Clifford had retained Mayo Levenson for this Twin Town matter." (R 24) Because of that conversation, the Referee immediately called Mr. John Flaherty, attorney for the Trustee, informed him that petitioner had come to his office, and told him to be "very, very careful in conducting the affairs of this estate and to make sure that the Clifford mortgage was well reviewed so that the interests of all creditors would be protected." (R 25-26, 107) Thereafter, at about 11:30 A.M. on December 20, 1960, a conference concerning the mortgage took place at the Referee's office, at which the Referee, the Trustee (Mr. Marcus) and Mr. Bennett were present. (R 41, 220) At this meeting the Referee said to Mr. Bennett that the problems in the case would not have occurred if petitioner had not "stuck his nose into the case", that he had become suspicious of petitioner when he came to the Referee's office in October and had immediately told Mr. Flaherty to give the case a thorough investigation, and that Mr. Bennett could go back and tell petitioner what the Referee had said. (R 220-221, 41) Mr. Bennett reported this conversation to petitioner at about 3 P.M. on the same day. (R 221, 308)

Thereupon, petitioner, in the presence of Mr. Bennett, immediately telephoned the Referee and had the conversation which played a large role in the decision of the District Court. According to the Referee's testimony, peti-

tioner first asked if the Referee had made the statements to Mr. Bennett, referred to above, and, upon receiving an affirmative reply, petitioner said, "Why, you Bastard. I never asked you to do anything wrong", and the Referee replied, "Mayo, no, you never did directly, but there was no doubt in my mind what you were driving at last October." (R 42) The Referee also testified that petitioner said that he had protected the Referee against "very influential people" because of his "tough decisions on secured creditors", that the Referee "had no damn business for [*sic*] sticking your nose into this Clifford matter", that Judge Clifford had appointed the Referee and "if Clifford loses this case, you're going to pay for it and pay for it dearly", and "we're going to organize a vicious campaign against you with the leading law firms, the Portland Banks, and we are going to exert pressure on Gignoux so that you will not be reappointed, and—you're going to get it head-on and I mean hard." (R 43)

Petitioner's version of this conversation differed in critical respects from that of the Referee. He denied that he had used any obscene language or called the Referee any names, (R 179) denied that he had telephoned the Referee concerning any business before him and stated that he had called him about the message the Referee had sent through Mr. Bennett, (R 180) admitted that he told the Referee that from that point on he would be the Referee's enemy and would oppose his reappointment with all his force, (R 179, 183) and categorically denied that he said he would organize the leading law firms of Portland and the Portland banks to exert pressure on Judge Gignoux so that the Referee would not be reappointed. (R 183)

Mr. Bennett, who was in petitioner's presence during the entire conversation, (R 221-223) testified that petitioner said to the Referee, "To hell with the mortgage. This is between Mayo Levenson and Dick Poulos." (R 222) thus

confirming petitioner's testimony that the conversation did not relate to any business before the Referee. He also testified, consistently with petitioner, that petitioner told the Referee that he would use everything in his power to oppose the Referee's reappointment, (R 233) but that he did not hear petitioner say that he would organize Portland law firms and banks to exert pressure on Judge Gignoux so that the Referee would not be reappointed or that he would cause as much trouble as he could to damage the Referee's professional and personal reputation. (R 234)

Mr. Bennett gave a graphic description of petitioner's uncontrolled anger during the conversation. "He was in such a tremendous emotional state, and I was sitting there with my mouth open. I had never seen him that way; that he could have said almost anything. It was incoherent and, as I say, his body was vibrating. I have never seen any man do that before. He was just shaking all over." (R 222)

The District Court made no specific finding as to which version of the conversation was correct. However, despite the testimony of petitioner and Mr. Bennett, the Court inferred that petitioner's remarks were related to the Clifford mortgage, that they could not have had any other effect than to influence the Referee, and that they caused the Referee to disqualify himself in the proceedings. (R 320) Moreover, the Court concluded that the remarks were precipitated by the Referee's correct handling of the issues in the case and not by any recent discovery that the Referee had questioned petitioner's conduct in the proceedings, since, among other things, petitioner must have been aware of the Referee's suspicions about him from the statements of the Referee at the conference of October 10, 1960; and that petitioner's attacks on the Referee were not prompted by a short-lived fit of uncontrolled temper be-

cause petitioner continued in a state of anger at least until the following afternoon. (R 320-321)

These important inferences are surely not supported by clear, unequivocal and convincing evidence. There is no doubt that petitioner called the Referee immediately upon being informed by Mr. Bennett of the Referee's message. That message was to the effect that the Referee, in his judicial capacity, had warned Mr. Flaherty, opposing counsel in the case, to be on his guard since petitioner could not be trusted. The Court's inference that petitioner's remarks related to the Clifford mortgage is no more reasonable than an inference that petitioner called the Referee olely to protest against the attack on his personal and professional integrity. Moreover, it may be fairly inferred that the Referee's disqualification was the culmination of a series of events which included not only his conversations with petitioner but also the indiscreet, derogatory remarks concerning petitioner which the Referee made to Mr. Flaherty, Mr. Clifford's nephew and Mr. Bennett.

The Court's conclusion that petitioner's remarks were precipitated by the Referee's correct handling of the case is based on speculation concerning the functioning of petitioner's mind. And the Court's reasoning that petitioner's remarks were not due to any recent discovery of the Referee's suspicions, since petitioner must have known of such suspicions on October 10, 1960, not only is based on a doubtful assumption, but, even if the assumption were valid, ignores the significance of the publication of the Referee's suspicions to a third party.

At about 9:30 or 10:00 A.M., December 20, 1960, petitioner had a telephone conversation with Mr. Myer Mareus, Trustee in the Twin Town matter. (R 77, 175-176, 223-224) Mr. Mareus testified that they discussed petitioner's request to see certain records of the bankrupt and then

talked about a purported agreement between Mr. Marcus and Mr. Bennett concerning the validity of the Clifford mortgage. (R 77-78) According to Mr. Marcus, petitioner then talked about the Referee and said, in substance, that the Referee had told Mr. Bennett that early in the proceedings the Referee had told Mr. Flaherty to be rough about the Clifford mortgage because he was suspicious of petitioner, that the Referee had made it appear that the Clifford mortgage was fraudulent and "can't continue to give legitimate businessmen a rough time," that the Referee was "getting too big for his britches [*sic*]," and that petitioner was "all done protecting him with the big law firms" and was going to campaign against him to see that the Referee was removed. (R 78-79, 92)

Petitioner called Mr. Marcus at about 3:30 or 3:45 P.M. on the following day, December 21st. (R 87, 180, 231) Mr. Marcus testified that petitioner was "infuriated," that he wanted to know exactly what had occurred at conferences earlier that day concerning the Clifford mortgage, that petitioner then repeated in substance what he had said about the Referee, according to Mr. Marcus, in the conversation of the previous morning, said that this was "a fight between Poulos and myself," and called the Referee a "monster." (R 88, 92-93) Mr. Marcus reported these conversations to the Referee. (R 89-91)

Petitioner admitted that both conversations took place. However, both petitioner and Mr. Bennett, who was with petitioner during the entire conversation of the morning of December 20th, (R 223, 225) denied that petitioner said anything about the Referee in that conversation. (R 177, 224) Petitioner admitted that, in his conversation with Mr. Marcus in the afternoon of December 21st, he had said that he would oppose the appointment of the Referee "with all the force that I could muster." (R 182) denied that he made any threats against the Referee with

respect to the Clifford mortgage, but admitted that he criticized the Referee's practice of requiring proof of the validity of mortgages. (R 182-183) Mr Bennett heard only the beginning of that conversation. (R 231-232)

Petitioner's remarks to Mr. Marcus, even though reported to the Referee, would seem to have contributed little on the substantive issue of the propriety of petitioner's conduct, since these remarks were substantially similar to his admitted direct statements to the Referee. But the District Court apparently accorded to these conversations a controlling effect on the critical issues of credibility.

The District Court accepted *verbatim* Mr. Marcus' version of the disputed conversation of the morning of December 20th. (R 306-307) Crediting Mr. Marcus' statement that petitioner had stated in that conversation that the Referee had told Mr. Bennett that he had advised Mr. Flaherty to be rough about the Clifford mortgage because of the Referee's suspicions of petitioner, (*supra*, page 21) the Court rejected petitioner's explanation that his remarks to the Referee in the afternoon of December 20th were caused solely by Mr. Bennett's message that the Referee had told Mr. Flaherty about his suspicions of petitioner, since Mr. Bennett had received that information from the Referee during the same morning but subsequently to the conversation between petitioner and Mr. Marcus. (R 321)

It is probable that Mr. Marcus confused the contents of the two telephone conversations. In the first place the testimony is undisputed that the Referee told Mr. Bennett that he had warned Mr. Flaherty about petitioner in the conference that took place at about 11:30 A.M. on December 20th. (*supra*, page 17) Secondly, the record is silent as to any source of information which petitioner could have had concerning the Referee's statements to Mr.

Bennett other than Mr. Bennett's report to him shortly before 3 P.M. on December 20th. Surely, petitioner could not have told Mr. Marcus in the morning of December 20th something that he did not know until that afternoon. Furthermore, petitioner and Mr. Bennett would have had no reason to deny that petitioner made any statements about the Referee in his first conversation with Mr. Marcus while freely admitting such statements in the second conversation. Finally, if Mr. Marcus' version of the conversation of the morning of December 20th were correct, it is difficult to understand his having lunch with Mr. Bennett on that day. (R 98)

The impact of the disagreement concerning the conversation of December 20th upon the credibility issues was magnified by the admission, over the repeated objections of petitioner, (R 254-255, 266-271) of rebuttal testimony by Mr. Marcus and Mr. Gerald Cope, chief clerk of the bankruptcy court, (R 255) concerning a conversation between them which was said to have occurred in the morning of December 20th soon after the conversation between Mr. Marcus and petitioner. (R 254)

According to Mr. Cope's testimony, Mr. Marcus told Mr. Cope about his earlier conversation with petitioner and stated that petitioner had said that he would "fix" the Referee and "that he was going to organize the leading banks—I'm sorry—the banks and leading law firms against Mr. Poulos' reappointment." (R 289) Mr. Marcus testified that he told Mr. Cope that petitioner had said that "Poulos is too big for his britches [*sic*]." (R 292) When asked if he had told Mr. Cope "anything about any threats and organizing banks," Mr. Marcus testified, in direct contradiction of Mr. Cope: "I couldn't possibly say anything about organizing banks because Mr. Levenson hadn't mentioned the banks to me until the second—until that following afternoon - - - ." (R 292)

The District Court, citing *Dwyer Pet'r. v. State of Maine*, 154 Me. 179 (1958), (R 289) ruled that the remarks of Mr. Marcus to Mr. Cope were admissible as prior consistent statements "for the limited purpose of rehabilitating Mr. Marcus," who had testified in the case in chief that petitioner discussed the Referee in the telephone conversation in the morning of December 20th. (R 289) Yet, Mr. Cope testified about a remark which, according to Mr. Marcus, had been made by petitioner in his conversation with Mr. Marcus on December 21st, subsequently to the conversation between Mr. Marcus and Mr. Cope in the morning of December 20th.

The remarks of Mr. Marcus to Mr. Cope were clearly inadmissible. Prior consistent statements are not admissible for the purpose of corroborating the testimony of a witness. *Ellicott v. Pearl*, 35 U.S. (10 Peters) 412 (1836); *Mellon v. United States*, 170 F. (2d) 583 (C.A. 5, 1948). However, where the witness has been impeached by an attack upon his credibility "tending to show that his testimony is a fabrication of recent date, or is colored, distorted, and falsified through the influence of some strong personal motive, interest in the litigation, or relation to the litigant," a prior consistent statement made at a time close to the event and *ante litem motam* is generally held to be admissible. *Dwyer Pet'r. v. State of Maine, supra*, 154 Me. at pages 196-197. *Ellicott v. Pearl, supra; Dowdy v. United States*, 46 F.(2d) 417 (C.A. 4, 1931).

But Mr. Marcus had not been impeached; he had merely been contradicted by petitioner and Mr. Bennett. See *Inman Bros. v. Dudley & Daniels Lumber Co.*, 146 Fed. 449 (1906). Moreover, the defense expressly disclaimed any contention that the Marcus testimony was a recent fabrication; (R 267-268) and no other condition existed, which would have justified admission of the prior statements.

The Court of Appeals conceded that it was "a close ques-

t on" whether Mr. Marens' prior statements were admissible. (App. A 34) However, that Court held that the issue need not be resolved inasmuch as any error in admitting the evidence was harmless (citing Rule 61 of the Federal Rules of Civil Procedure), since it was not particularly significant whether petitioner castigated the Referee in both of his conversations with Mr. Marens or only on the conversation of December 21st. (App. A 34) This holding ignores both the purpose and effect of the uncontroverted evidence.

The purpose of the prosecution in offering the prior statements was to support the credibility of Mr. Marens and, *pari passu*, to attack the credibility of petitioner and Mr. Bennett. This was made crystal clear by the United States Attorney in arguing that the statements were admissible. "Yes," he said, "the witness Marens' credibility is definitely in issue. The credibility of Levenson and Bennett also is directly in issue, and particularly in regard to what Mr. Levenson said to Mr. Marens on the morning of the 20th; a very short time thereafter he repeated that conversation to a third party." (R 257)

The effect of the admission of the disputed evidence must be weighed in the context of the District Court's statement that it was "faced primarily with stark issues of credibility as between the Respondent and the Referee." (R 300) It is clear that the District Court rested upon the prior statements of Mr. Marens in adopting as its findings the *verbatim* testimony of Mr. Marens concerning his conversation with petitioner on December 20th. (R 306-307) For the District Court stated:

"As the foregoing findings also indicate, the Court has also been unable to accept Mr. Levenson's version of his December 20th telephone conversation with Mr. Marens, which is wholly inconsistent with Mr. Marens' testimony as to that conversation, the substance of which was reported by Mr. Marens to Mr. Cope on the same day."

(R 320) The conclusion is inescapable that the admission of the prior statements of Mr. Marcus was not only erroneous but highly prejudicial to petitioner.

Thus, petitioner has been disbarred as a result of conversations, mostly on the telephone, on testimony that was in sharp conflict. Issues of credibility were resolved against petitioner even though the principal witness against him was deeply engaged in the controversy (R 287) and was hostile and biased. Finally, the scales may well have been tipped against petitioner by the impact of testimony of alleged prior consistent statements which were internally inconsistent and which were improperly admitted in evidence. Clearly, the order of the District Court does not rest upon clear, unequivocal and convincing proof. Nor did the Court of Appeals require such proof.

III. *Whether an Order of Disbarment is Unduly Severe in Circumstances Such as Existed in this Case.*

The Court of Appeals assumed that the trial court found that petitioner "had threatened and attempted to intimidate the Referee in Bankruptcy with respect to a matter pending before him." (App. A 32) There is no statement by the Court of Appeals, nor finding by the District Court, that petitioner threatened or intimidated the Referee in order to achieve a decision in favor of petitioner's client.

The trial court did adopt as part of its findings the Referee's account of his conversation with petitioner on October 10, 1960. (R 303) But there is surely not enough in the Referee's version of that conversation to support a conclusion that petitioner's purpose was to influence the Referee to make a corrupt ruling in his client's favor. Even if petitioner, on his own initiative, reminded the Referee that his client's brother, Judge Clifford, had appointed the Referee,

this remark does not amount to a request for a decision in petitioner's favor without regard to the merits of the claim. Surely, petitioner's statement that he was not being paid for his services to his client had no tendency to corrupt the Referee. And petitioner's inquiry as to how the Referee would "protect" his client's claim (see *supra*, page 16), does not amount to a request for such protection whether or not the claim were valid.

In addition, the trial court found that the Referee was "fully warranted in being suspicious" about petitioner as a result of this conversation. (R 319) But this does not constitute a finding that petitioner intended to induce the Referee to make an improper decision in his client's favor.

Petitioner's remarks in his telephone conversation with the Referee on December 20, 1960, and his telephone conversations with Mr. Marcus on December 20th and December 21st, even under the Court's findings, could not have been intended to press for a corrupt decision in favor of his client. His angry attacks on the Referee were far more likely to engender resistance to his client's claim. And the trial court found that petitioner's remarks "did in fact place the Referee in a position which compelled him to disqualify himself from conducting further proceedings in that matter." (R 320)

Accordingly, we submit that there is no issue as to whether petitioner attempted to induce a corrupt decision in his client's favor. Petitioner's misconduct consisted of improper attacks upon, criticisms of, and threats to prevent the reappointment of, the Referee, which are admitted to the extent already shown. The following discussion assumes, *arguendo*, that the District Court's findings as to the extent of such attacks and criticisms, and the causation thereof, were supported by clear and convincing evidence although we have shown above that this is not true. But no assumption is made that petitioner at any time at-

tempted to influence the Referee to make a corrupt decision in favor of his client.

This Court has not hesitated to concern itself with the severity of a disbarment order against a protest that the matter rests within the discretion of the trial court. *Sacher v. Association of the Bar of the City of New York, supra.* For the entire legal profession is concerned with the circumstances under which an order of disbarment may be entered. Especially is this true where, as here, the grounds for disbarment are found in the exercise of professional duties on behalf of a client. Wisdom and understanding of the pressures upon a lawyer engaged in forensic pursuits are found in Mr. Justice Jackson's dissent in *In re Isserman*, 345 U.S. 286 (1953) at page 294: "Perhaps consciousness of our own short patience makes us unduly considerate of the failing tempers of others of our contentious craft."

Petitioner's indiscretions "stemmed from an excess of zeal for his clients that obscured his recognition of responsibility as an officer of the court." *Sacher v. Association of the Bar of the City of New York, supra*, 347 U.S. at page 388. There was uncontradicted evidence that petitioner was not to be paid for his services, (R 172, 208) and petitioner had no pecuniary motive for his excessive activities in the case. He was neither venal nor unfaithful to his clients, and his conduct demonstrated no moral turpitude. *Cf. In re Patterson, supra; In re Sacher*, 206 F. (2d) 358 (C.A. 2, 1953); *Bartos v. United States District Court*, 19 F. (2d) 722 (C.A. 8, 1927).

Petitioner's direct approaches to the Referee and the Trustee were consistent with the informalities that surround the practice of law in Portland, Maine, which are abundantly shown in the record. The friendly relations and social contacts, *pendente lite*, of clients, attorneys, Referee and Trustee were conducive to familiar exchanges

that corroded the usual barriers between bench and bar. In such circumstances it is understandable, if not excusable, that petitioner exceeded the limits of propriety in his conversations with the Referee.

Notwithstanding the findings of the District Court, it seems clear that petitioner's objectionable conduct was, for the most part, provoked by the Referee's attack upon his personal and professional integrity. Such provocation, while not excusing petitioner, constitutes an extenuating circumstance which mitigates petitioner's guilt. *Camp v. Herzog*, 104 F. Supp. 134 (D.C., 1952); *cf. Sacher v. United States*, 343 U.S. 1, 14 *et seq.*, 38 (1952), dissenting opinions of Mr. Justice Black and Mr. Justice Frankfurter.

There can be no doubt that petitioner acted in anger. His extreme emotional state in his conversation with the Referee on December 20, 1960, is sufficiently shown above. *Supra*, page 19. According to Mr. Marcus, petitioner was "infuriated" in their conversation of December 21st. (R 88) In these circumstances disbarment is unwarranted. *In re Ball*, 123 F. Supp. 389 (D. Nev., 1954); *In re Rollstock*, 16 Cal. (2d) 449 (1940).

During the trial petitioner contritely admitted that he had behaved improperly (R 179) and apologized to the Court and the Referee in his official capacity, but refused to apologize to the Referee as an individual. (R 179, 188-189) Petitioner's change of attitude and apology are additional mitigating factors. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872); *In re Ball, supra*.

The District Court assigned as a reason for its judgment petitioner's "previous censure by this Court for unethical conduct." (R 323) Undoubtedly, the Court had reference to petitioner's admission (R. 201) that he thought that District Judge Clifford had censured him in the opinion in *In re Deena Woolen Mills*, 114 F. Supp. 260 (D. Me., 1953). But the opinion clearly shows that, while Judge Clifford

criticised the conduct of petitioner, he took no disciplinary action against petitioner by way of censure or otherwise.

It is true, as the District Court acknowledges, (R 322) that removal from the bar should "never be decreed where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired." *Bradley* v. *Fisher*, *supra*, 80 U.S. (13 Wall.) at page 355. In all the circumstances here presented, we submit that the disbarment order was unduly severe. The Court of Appeals seems to intimate that the order was too severe by pointing out that petitioner may always apply to the District Court for reinstatement. (App. A 34-35) *Cf: In re Collins*, 210 F. (2d) 373 (C.A. 5, 1954). However, a direct modification of the disbarment order, or a remand of the case with directions to modify that order, was required in this case. *Cf: Sacher* v. *Association of the Bar of the City of New York*, *supra.*; *Costigan* v. *Adkins*, 18 F. (2d) 803 (C.A.D.C., 1927). See *In re Bull*, *supra*; *In re Ades*, 6 F. Supp. 467 (D. Md., 1934).

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD ROSENWALD
PAUL A. POWELL
85 Devonshire Street
Boston, Massachusetts
Attorneys for Petitioner

Of Counsel:
ALAN J. LEVENSON
187 Middle Street
Portland, Maine

Appendix A

United States Court of Appeals
For the First Circuit

No. 5810.

MAYO S. LEVENSON,

RESPONDENT, APPELLANT,

v.

PETER MILLS, UNITED STATES ATTORNEY,

MOVANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MAINE.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Alan J. Levenson for appellant.

Peter Mills, United States Attorney, with whom *Elmer E. Runyon*, Assistant U. S. Attorney, was on brief, for appellee.

OPINION OF THE COURT.

August 24, 1961.

WOODBURY, *Chief Judge*. This is an appeal from an order entered after full hearing disbarring the appellant from practicing in the United States District Court for the District of Maine and striking his name from the roll of attorneys permitted to practice in that court.

The procedures adopted by the court below were fully agreed to in advance by counsel on both sides. There is no need to review those procedures here. It will be enough to say that the appellant was given ample notice of the charges laid against him and afforded every opportunity for explanation and defense. The procedures adopted by

the court below were eminently fair in every respect and in no way prejudicial to the appellant's rights. See *Randall* v. *Brigham*, 7 Wall. 523, 540 (1868); *Ex Parte Wall*, 107 U.S. 265, 271, 272 (1883).

The basic question on this appeal is whether the evidence supports the trial court's finding that the appellant had threatened and attempted to intimidate the Referee in Bankruptcy with respect to a matter pending before him, had used abusive, scandalous and indecent language in addressing the Referee in an attempt to influence, obstruct and impede the administration of justice and had threatened to conduct a campaign of vilification against the Referee aimed at preventing his reappointment and the destruction of his personal and professional reputation. A full rehearsal of the evidence would serve no purpose other than to give further publicity to the appellant's misconduct. The following general comments will suffice.

A careful examination of the record shows that the court below was fully aware of the delicate and important question it was required to decide. It shows that the court fully appreciated the vital importance of maintaining the purity of the judicial process and the reputation of the bar for respectability and integrity. And it shows that the court was not by any means unmindful of the grave consequences to the appellant, not only professionally but also personally, of loss of the right to practice before the court. With this in mind the court was exceedingly careful, and on occasion may even have leaned over backward, to give the appellant every opportunity to present any evidence he or his counsel thought pertinent in the way of mitigation, explanation and defense.

The evidence is sharply conflicting on the key issues. In this situation the court below could only decide those issues on the basis of the relative credibility of the witnesses and, that, of course, is a matter it is peculiarly competent to

decide. Indeed, in this case it is especially appropriate for us to heed the admonition in Rule 52(a) of the Federal Rules of Civil Procedure to give "due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses", for one of the most important witnesses was the court's Referee in Bankruptcy and many of the others were members of the Maine bar and so could not have been strangers to the district judge who practiced actively at that bar before his elevation to the bench. The findings of fact made by the court below cannot by any means be said to be "clearly erroneous."

A question of the admissibility of certain testimony calls for brief consideration.

The Trustee of an estate in bankruptcy testified to telephone conversations with the appellant on December 20 and December 21, 1960, in both of which he said the appellant threatened to conduct a campaign of vilification against the Referee to prevent his reappointment. When the appellant took the stand in his own defense he admitted his telephone conversations with the Trustee but not their content. He said that he did not mention the Referee at all in the telephone conversation with the Trustee of December 20, but conceded that he talked with the Trustee about the Referee's behavior in the telephone conversation on December 21 but not in the abusive and threatening vein testified to by the Trustee. In rebuttal the Trustee was called back to the stand to testify in corroboration of his earlier testimony that immediately after the telephone conversation of December 20 he rushed up to the bankruptcy court and reported to the clerk of that court in confidence that the appellant was making threats against the Referee. This testimony was excluded, and thereupon the clerk of the bankruptcy court was called to the stand to testify to the same conversation with the Trustee. After considerable hesitation the court below over the strenuous objection

of the appellant admitted the clerk's testimony, but only for the limited purpose of corroborating the Trustee's testimony that the appellant had discussed the Referee in their telephone conversation of December 20 as well as on December 21.

It is a close question whether the clerk's testimony was admissible under the holding of the Supreme Judicial Court of the State of Maine in *Dwyer* v. *State of Maine*, 154 Me. 179 (1958), on which the court below relied for its ruling. We need not undertake to resolve that question, however, for if it was error to admit the evidence the error was harmless for the reason that nothing vital to the appellant hinged on whether he mentioned the Referee in his telephone conversation with the Trustee on December 20 or not until the next day. The issue resolved by the court below against the appellant, obviously on the basis of credibility, is the language used by the appellant, *i.e.*, whether he castigated the Referee in violent and abusive language and threatened to conduct a campaign against him in talking with the Trustee over the telephone. It is not particularly significant whether he did so once or twice or on one day rather than the next. Perhaps the clerk's testimony has some tendency to corroborate the Trustee's version of the conversation as vitriolic and threatening instead of mild, as the appellant asserted. But the court below was careful not to use the clerk's testimony for the purpose of determining the tenor of the appellant's remarks but only on the question of the timing of the remarks. In the context of this case that is not a vital matter. The error, if it was error to admit the clerk's testimony, could not have affected any substantial right of the appellant. It was harmless. See Rule 61, Federal Rules of Civil Procedure.

As to the appellant's further contention that the order of the court below is unnecessarily severe, it is enough to say that although the order is permanent in form it is not

irrevocable. It does not necessarily prevent the appellant from reinstatement on proof of "a sincere and timely change of attitude." See footnote 5 of Mr. Justice Reed's dissenting opinion in *Sacher* v. *Assn. of the Bar of the City of New York*, 347 U.S. 388, 393 (1954).

Judgment will be entered affirming the order of the District Court.

Appendix B

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

On the same day, August 24, 1961, the following judgment was entered:

JUDGMENT.

August 24, 1961.

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:
(s) ROGER A. STINCHFIELD
Clerk

Approved:
(s) JOHN P. HARTIGAN, C. J.